Supreme
APR 4

No. 02-954

In the Supreme Court of the United States

OFFICE OF INDEPENDENT COUNSEL, PETITIONER

v.

ALLAN J. FAVISH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

Cases:	Page
Accurancy in Media, Inc. v. *National Park Serv.*, 194 F.3d 120 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000)	3
Bibles v. *Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997)	5
Cooper Cameron Corp. v. *United States Dep't of Labor*, 280 F.3d 539 (5th Cir. 2002)	8
Crawford-El v. *Britton*, 523 U.S. 574 (1998)	5
Davis v. *United States Dep't of Justice*, 968 F.2d 1276 (D.C. Cir. 1992)	3
Department of Defense v. *FLRA*, 510 U.S. 487 (1994)	5
Department of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)	2-3, 5, 6, 8
Department of State v. *Ray*, 502 U.S. 164 (1991)	4, 5, 7
Halloran v. *Veterans Admin.*, 874 F.2d 315 (5th Cir. 1989)	7
KTVY-TV v. *United States*, 919 F.2d 1465 (10th Cir. 1990)	3
Marzen v. *HHS*, 825 F.2d 1148 (7th Cir. 1987)	7
Neely v. *FBI*, 208 F.3d 461 (4th Cir. 2000)	3
SafeCard Servs., Inc. v. *SEC*, 926 F.2d 1197 (D.C. Cir. 1991)	3
Senate of Puerto Rico v. *United States Dep't of Justice*, 823 F.2d 574 (D.C. Cir. 1987)	3
Stone v. *FBI*, 727 F. Supp. 662 (D.D.C. 1990), aff'd, No. 90-5065, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990)	6
Statutes:	
Consolidated Appropriations Resolution, 2003, H.R. J. Res. 2, 108th Cong., 1st Sess. (2003)	2

Statutes—Continued: Page

Freedom of Information Act:
5 U.S.C. 552 1
5 U.S.C. 552(b)(7)(C) 1, 2, 5, 7, 8

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In this case, the Ninth Circuit has ordered the release, under the Freedom of Information Act (FOIA), 5 U.S.C. 552, of the very same photographs that the D.C. Circuit previously had held were exempt from disclosure under FOIA Exemption 7(C), 5 U.S.C. 552(b)(7)(C). That direct conflict in the circuits on the disposition of two FOIA requests for the same documents reflects a deeper divergence in the courts of appeals over the proper analysis of the public interest side of Exemption 7(C)'s balancing test. The Ninth Circuit came to a different result because it analyzed the applicability of Exemption 7(C) under different legal standards than those applied by the D.C. Circuit and other circuits.

The importance of that question is reflected in the Court's decision, earlier this Term, to grant certiorari in *United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives* v. *City of Chicago*, No. 02-322 (*ATF*), to address the courts of appeals' divergent approaches to the public interest prong of the Exemption 7(C) analysis. See 02-322 Pet. at i, 17-19. Indeed, it was because the question of the proper application of Exemption 7(C) was already pending before the Court that the government suggested that the present petition be held pending the Court's decision in *ATF*. See 02-954 Pet. 7-9, 18-19. However, on February 26, 2003, the Court summarily vacated the court of appeals' decision in *ATF* and remanded for reconsideration in light of an intervening Act of Congress, Division J, Title 6, Section 644, of the Consolidated Appropriations Resolution, 2003, H.R. J. Res. 2, 108th Cong., 1st Sess. (2003). The Court accordingly did not address the merits of the Exemption 7(C) claim in the *ATF* case. The intervening legislation had particular application to the Freedom of Information Act request at issue in the *ATF* case. It has no application to the instant petition, and it did not address the courts of appeals' differing approaches to Exemption 7(C) claims. Accordingly, the government now submits that the certiorari petition in this case should be granted to address that enduring circuit conflict.

1. Exemption 7(C) protects from disclosure law enforcement records, such as the death-scene photographs at issue here, if their production "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(7)(C). In applying Exemption 7(C), courts must balance the public interest in the documents against the intrusion on privacy that disclosure would occasion. See *Department of Justice*

v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989).

In this case, the only public interest asserted by respondent Favish is in uncovering alleged governmental misfeasance in the conduct of five different investigations into Foster's death. As explained in the government's petition (see 02-954 Pet. 9-11), in concluding that the public interest in disclosure of the four photographs of Vincent Foster's body outweighed the familial privacy interest, the Ninth Circuit held that actual evidence or knowledge of "misfeasance by the agency" is not necessary. Pet. App. 11a. All the Ninth Circuit required to outweigh a valid privacy interest was an "argument" and some indiscernible quantum of "evidence" that, "if believed," would reveal governmental misconduct. *Ibid.* That holding directly conflicts with the decision of the D.C. Circuit concerning the same (and other) photographs. *Accuracy in Media, Inc.* v. *National Park Serv.*, 194 F.3d 120 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000). In that case, the D.C. Circuit applied established circuit precedent requiring compelling evidence of governmental misconduct to overcome the presumption of legitimacy that attaches to governmental actions and to outweigh legitimate privacy interests. *Id.* at 124; see also *Davis* v. *United States Dep't of Justice*, 968 F.2d 1276, 1282 (D.C. Cir. 1992); *SafeCard Servs., Inc.* v. *SEC*, 926 F.2d 1197, 1205-1206 (D.C. Cir. 1991); *Senate of Puerto Rico* v. *United States Dep't of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987) (R.B. Ginsburg, J.). Other courts of appeals have likewise required more substantial showings. See *Neely* v. *FBI*, 208 F.3d 461, 464 (4th Cir. 2000) (public interest is "negligible" in absence of a "compelling allegation of agency corruption or illegal-

ity"); *KTVY-TV* v. *United States*, 919 F.2d 1465, 1470 (10th Cir. 1990).

Respondent Favish acknowledges (Br. in Opp. 2-3) the conflict in legal standards applied by the courts of appeals, and does not disagree that they resulted in essentially the same FOIA case being decided differently by the Ninth and D.C. Circuits. Favish's only answer is to suggest that the courts' approaches admit of even greater variety. *Id.* at 15. But that argument enhances, rather than diminishes, the need for this Court's intervention.

The government's petition further notes the tension between the Ninth Circuit's analysis and this Court's decision in *Department of State* v. *Ray*, 502 U.S. 164 (1991). In *Ray*, the Court explained that an "asserted interest in ascertaining the veracity of the [government's] interview reports" would not outweigh privacy interests, where "[t]here is not a scintilla of evidence, either in the documents themselves or elsewhere in the record, that tends to impugn the integrity of the reports." *Id.* at 179. The Court left open in that case the question of "[w]hat sort of evidence of official misconduct might be sufficient to identify a genuine public interest in disclosure," *ibid.*, which is the very question on which the courts of appeals are now in conflict.

As Favish emphasizes repeatedly (Br. in Opp. 15, 18, 20), under the Ninth Circuit's approach, the privacy interests of third parties in law-enforcement records would be overcome if a FOIA requester "tenders" speculation and "argument" that, "if believed," would reveal governmental misfeasance. Under that standard, all it would take to obtain private information from government files is one individual who refuses, in the face of five different investigations by different branches of the government and two Independent

Counsels, to "trust the government to fairly and accurately characterize the evidence" (*id.* at 16), unless he "see[s] the evidence for [him]self." Because such allegations of governmental misconduct are "easy to allege and hard to disprove" to the level of satisfaction required by the Ninth Circuit here, *Crawford-El* v. *Britton*, 523 U.S. 574, 585 (1998), that standard empties Exemption 7(C) of important privacy protection for third parties, contrary to this Court's direction in *Ray*, 502 U.S. at 179.

2. As the government's petition also explains (at 11-14), under the *Reporters Committee* balancing test, the relevant public interest under Exemption 7(C) is the extent to which disclosure would "contribute *significantly* to public understanding of the operations or activities of the government." 489 U.S. at 775 (emphasis added). That is "the only relevant public interest." *Department of Defense* v. *FLRA*, 510 U.S. 487, 497 (1994); see also *Bibles* v. *Oregon Natural Desert Ass'n*, 519 U.S. 355, 355-356 (1997) (per curiam). Following this Court's direction, other courts of appeals have required FOIA requesters to demonstrate a nexus between the disclosure of the specific document and advancement of the identified public interest. See 02-954 Pet. 11-12 (citing cases).

The Ninth Circuit, however, required no such nexus here. See 02-954 Pet. 11-14. As explained in the petition, Favish claims that one of the photographs would assist in investigating the gun used by Foster to commit suicide. Numerous pictures of Foster's gun, however, have already been released to Favish. *Id.* at 12-13. The court of appeals offered no explanation as to how the release of yet another picture of the gun would "contribute significantly" to public understanding of the government's activities. Any public interest in analyz-

ing blood and other matter on the gun (Br. in Opp. 7) was fully served by disclosure of the earlier photographs of that same gun. Beyond that, Favish's personal interest in seeing every picture of the gun in the possession of the government because the government is "demonstrably untrustworthy and deceptive" (*id.* at 6)—an assertion rejected by five other investigations into the death of Foster—cannot be equated with the "public" interest. *Stone* v. *FBI*, 727 F. Supp. 662, 667 n.4 (D.D.C. 1990) ("[T]he same bit of new information considered significant by zealous students of the [] investigation would be nothing more than minutiae of little or no value in terms of the public interest."), aff'd, No. 90-5065, 1990 WL 134431 (D.C. Cir. Sept. 14, 1990) (sustaining the withholding of information concerning the assassination of Robert F. Kennedy).

Favish also argues (Br. in Opp. 7) that he wants to investigate "why the gun appears to be partially lodged under Foster's leg." That argument—which amounts to nothing more than speculation about the implications of the gun's location—highlights the unworkability of the Ninth Circuit's approach. Some FOIA requesters have an unlimited capacity to see new indicia of governmental conspiracy or cover-up at every turn, and simply asking whether their speculation and suspicions, "if believed," would reveal governmental misconduct—which, by definition, they would— leaves no substantial protection for the privacy interests of third parties in information that "happens to be in the warehouse of the Government," *Reporters Comm.*, 489 U.S. at 774.

With respect to the other photographs at issue, Favish's extended discussion (Br. in Opp. 8-13) of his desire to track the flow of blood from Foster's head and to look for signs of a neck wound proves the point made

in the government's certiorari petition. None of the photographs ordered released reveal Foster's head or neck; they all focus on his shoulder, arm, and torso. Having concluded that the pictures relevant to that inquiry—photographs of Foster's head and face—should *not* be disclosed, the court of appeals was not free to order the disclosure of other photographs to compensate for that withholding.

3. The Ninth Circuit again departed from this Court's and other circuits' precedent when it held that the multiple, lengthy investigations that had already taken place into Foster's death, and the enormous volume of materials (including photographs) about that death already in the public domain are irrelevant to evaluation of the public interest under Exemption 7(C). Compare Pet. App. 11a ("Nothing in the statutory command shields an agency from disclosing its records because other agencies have engaged in similar investigations."), with *Ray*, 502 U.S. at 178 (the "public interest has been adequately served by disclosure of the redacted interview summaries"); *Halloran* v. *Veterans Admin.*, 874 F.2d 315, 324 & n.13 (5th Cir. 1989) ("That [public] interest, however, has already been substantially served by the release of the redacted transcripts and the VA's report on the investigation, from which the full nature and extent of the VA's actions, as well as whatever the VA learned from its surreptitious recording of the conversations, can be discerned."); *Marzen* v. *HHS*, 825 F.2d 1148, 1153-1154 (7th Cir. 1987) (release of information "would not appreciably serve the ethical debate since most of the factual material concerning the details of the case, including the final HHS report are already in the public domain"); and 02-954 Pet. 16 n.7 (citing additional cases).

Favish insists (Br. in Opp. 18-19) that the court of appeals properly disregarded the volume of information already released to the public because Favish articulated arguments that, "if believed," would suggest deficiencies in the government's investigation. As before, that argument mistakenly equates Favish's personal interest in disclosure of every single record and document related to the Foster investigation, no matter how private, with the public's interest in knowing "what the Government is up to," *Reporters Comm.*, 489 U.S. at 780. Other courts of appeals have rejected that proposition. *See Cooper Cameron Corp.* v. *United States Dep't of Labor*, 280 F.3d 539, 549 (5th Cir. 2002) (describing Favish's asserted public interest as "highly tenuous" in light of the previous investigations); 02-954 Pet. 16-17 & n.7.

4. In any event, the relevant question for present purposes is not whether the Ninth Circuit's reading of Exemption 7(C) is correct, but whether other courts of appeals would have applied different legal standards to Favish's FOIA claim and come out differently. That question is answered by the D.C. Circuit's decision sustaining the withholding of the same photographs that the Ninth Circuit has ordered released. Accordingly, authoritative guidance from this Court is necessary to establish uniformity in the analysis of the public interest prong of the Exemption 7(C) balance. The privacy interests of millions of individuals, about whom personal and sensitive information is stored in government files, should not vary based on the circuit in which a FOIA request is filed.

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For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APRIL 2003